No. 17-333

In the Supreme Court of the United States

O. JOHN BENISEK, EDMUND CUEMAN, JEREMIAH DEWOLF, CHARLES W. EYLER, JR., KAT O'CONNOR, ALONNIE L. ROPP, *and* SHARON STRINE,

Appellants,

v.

LINDA H. LAMONE, *State Administrator of Elections*, *and* DAVID J. MCMANUS, JR., *Chairman of the Maryland State Board of Elections*,

Appellees.

On Appeal from the United States District Court for the District of Maryland

BRIEF FOR THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF AMICUS CURIAE

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law ("Brennan Center") is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve the systems of democracy and justice. The Brennan Center was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality, including by protecting the right to vote and ensuring fair, transparent, and constitutional redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on redistricting, promotes efforts to reform the redistricting process, and regularly participates in redistricting and voting-rights cases before this Court.[1]

The Brennan Center has a significant interest in this case because the Brennan Center has long been concerned with the growth of extreme partisan gerrymandering, a rare but especially pernicious redistricting tactic that deeply offends the constitutional principles that form the foundation of our representative democracy. On the basis of its own research and studies undertaken by others, the Brennan Center has identified readily discernible evidentiary signposts that can help the Court accurately differentiate lawful

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[1] Counsel for petitioner and respondents have filed blanket consents to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. This brief does not purport to convey the position of the New York University School of Law.

redistricting from the type of unlawful partisan gerrymandering that has almost certainly tainted a handful of the congressional maps this redistricting cycle, including Maryland's.

The Brennan Center hopes that its perspective will help the Court define a manageable standard that reliably targets extremely biased and constitutionally offensive maps, limits the range of plausible claims in ways easily understandable by courts and potential litigants, vindicates bedrock constitutional rights and values, and respects states' exercise of their traditional political prerogatives.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case involves an extreme partisan gerrymander, a particularly pernicious—but relatively rare—redistricting tactic that seeks to "subordinate adherents of one political party and entrench a rival party in power." *Ariz. State Leg.* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2658 (2015). To create extreme partisan gerrymanders, map-makers carefully sort a state's citizens into electoral districts on the basis of their political beliefs and political associations. The objective of this sorting is to maximize and lock down as many seats as possible for one party.

Extreme partisan gerrymandering is precisely what happened in Maryland in 2011, as the record in this case demonstrates. Democratic officials redrew the state's congressional districts in secret with the admitted goal of securing Democrats' share of Maryland's congressional delegation and increasing it from 6-2 in Democrats' favor to 7-1. Maryland Democrats accomplished that objective by removing their state's Republican voters from a district where those voters could associate effectively to elect their preferred

candidates and transplanting them to districts where they could not.

Appellants have identified a district-specific aspect of the harm that extreme partisan gerrymanders inflicted upon individual voters in Maryland. Indeed, every extreme gerrymander necessarily involves the kind of First Amendment harms experienced by the Republican voters in Maryland's Sixth District.

But extreme partisan gerrymanders, first and foremost, represent a statewide assault on democracy, and they cause statewide harm to supporters of the burdened political party by intentionally abridging the voting strength of disfavored voters across the state. In evaluating partisan gerrymandering cases, therefore, the Court should focus on such statewide, structural harms, so that it may ensure the most extreme, anti-democratic gerrymanders are invalidated.

The test proposed by the plaintiffs in *Gill* v. *Whitford* is manageable and well suited to identify extreme partisan gerrymanders that have constitutional consequences on a state-wide basis, as well as in particular districts. That test confirms that Maryland Republicans suffered constitutional harms in this case. This case, conversely, confirms that the *Whitford* test is appropriate to identify unconstitutional gerrymanders.

Maryland's 2011 redistricting indeed qualifies as an unconstitutional extreme partisan gerrymander under the three-factor *Whitford* test, which looks to (1) discriminatory purpose or intent, (2) durable and sizable discriminatory effect, and (3) neutral justifications for the redistricting plan. Maryland Democrats' unequivocal intent was to reduce Republican electoral strength and entrench Democrats in Maryland's congressional delegation, as Governor O'Malley admitted in sworn testimony. The gerrymander had a

significant, statewide effect; it added a seventh safe Democratic congressional seat. And the state's purported justification for the warping of the Sixth District—to preserve the integrity of a purported community of interest along the I-270 corridor—finds no support in the record.

Several additional factors previously identified by the Brennan Center—including single-party control over the redistricting process and departures from "normal politics" in that process—can help courts identify an extreme partisan gerrymander, and, in this case as in *Whitford*, these factors confirm the unconstitutionality of the electoral maps at issue. Democrats controlled the redistricting process in Maryland, and the gerrymanderers drew the map in secret, excluded the Republican Party from the map-drawing exercise, and pushed the plan through the legislature with striking haste, signing it into law three days after it was introduced to the legislature.

The extreme partisan gerrymander in Maryland thus violates Maryland Republicans' First Amendment rights. The First Amendment shields a political party and its supporters from discrimination that substantially burdens their right, through association with others, to gain and exercise political power and influence. Here, map-drawers set out to—and did—infringe that right, substantially burdening the ability of Republicans throughout the state to promote their beliefs at the polls. The Court should reverse the decision of the district court.

ARGUMENT

I. Appellants Have Identified First Amendment Harms Caused By Maryland's 2011 Congressional Redistricting.

As the Wisconsin plaintiffs and the Brennan Center explained in *Whitford*, extreme partisan gerrymanders violate core First Amendment rights, including the right to associate to advance political goals and the right to participate freely and effectively in the political process. *Whitford* Appellees' Br. 34–36; Brennan Ctr. Br. 33–36, *Gill* v. *Whitford* (No. 16-1161) ("*Whitford* Brennan Br."). The record in this case demonstrates that Maryland's 2011 redistricting was unconstitutional; map-makers purposefully and impermissibly targeted Republican voters for particular burdens on their "ability . . . to band together in promoting among the electorate candidates who espouse their political views." *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000). The entire process, from start to finish, was animated by improper partisan discrimination, in violation of the First Amendment.

The map-makers in charge of Maryland's 2011 congressional redistricting candidly admitted that an overriding goal of the map-drawing exercise was to maximize Maryland Democrats' representation in the U.S. House of Representatives. JA54. Before 2011, Democrats in the state could reliably elect six representatives to Congress, while Republicans could reliably elect two. In Democrats' view, that was too many Republicans. So they asked the map-drawers, who were under their control, to engineer a map that both protected existing Democratic incumbents and added at least one new, safe Democratic district. JA107–08. They decided against seeking two additional seats only because maps with eight Democratic

representatives would not have adequately protected incumbents. JA824.

The map-drawers achieved their objective through standard gerrymandering techniques. They "cracked" Maryland Republicans by moving a substantial number of them from a Republican-leaning district—the Sixth District—and replacing them with excess Democratic voters from adjoining Democratic districts. JA766, 773; J.S. App. 41a–42a. The goal of such "cracking" is always to dilute the voting strength of the members of the disfavored political party as compared to the voting strength of members of the gerrymandering party. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (plurality op.) (explaining "cracking"). That is exactly what happened here—since 2011, Maryland Republicans have elected one fewer Republican to Congress, and Maryland Democrats have elected an additional Democrat to Congress. JA656, 666; Appellants J.S. 11–13.

This intentional redistribution of political power is a quintessential First Amendment violation. Democratic map-drawers discriminatorily diluted Appellants' voting strength because Appellants previously favored Republican candidates. In other words, they targeted Republican voters "*because of* their participation in the electoral process, their voting history, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring) (emphasis added); *see* JA764, 891. The First Amendment prohibits such intentional and substantial discrimination on the freedom to associate.

And far from being specific to voters in the Sixth District, the constitutional harms in this case (as in all extreme partisan gerrymanders) are spread across the entire state. In this case, as in every case involving

extreme gerrymandering, the redistricting party sets out to enhance its *statewide* power by categorizing voters around the state based on their political beliefs and associations, and by shifting district lines on that basis to secure a statewide advantage. Such discrimination was front and center in Wisconsin's gerrymander of state legislative districts. *Whitford* v. *Gill*, 218 F. Supp. 3d 837, 890–910 (W.D. Wis. 2016); *see Whitford* Appellees' Br. 4–17. So too in the extreme partisan gerrymander of North Carolina's congressional districts, recently invalidated by a three-judge district court. *Common Cause* v. *Rucho*, 2018 WL 341658, at *35–57 (M.D.N.C. Jan. 9, 2018), *stay granted*, 2018 WL 472142 (U.S. Jan. 18, 2018). And again in the extreme partisan gerrymander of Pennsylvania's congressional districts, which the Pennsylvania Supreme Court recently held violated the state constitution. *League of Women Voters of Pa.* v. *Commonwealth*, 2018 WL 496907 (Pa. Jan. 22, 2018); *see* Petitioner's Opening Brief at 6–40, *League of Women Voters of Pa.*, 2018 WL 496907 (No. 159 MM 2017).

The extreme partisan gerrymanders in these and a handful of other states violate "the core principle of republican government, namely, that the voters should choose their representatives, not the other way around." *Ariz. State Leg.*, 135 S. Ct. at 2677 (internal quotation marks omitted). Such gerrymanders entrench the redistricting party in power on the statewide level, abridging voters' First and Fourteenth Amendment rights and leading to elected officials who are less representative of and less accountable to their constituents. *See Whitford* Brennan Br. 21–33. The Court can and should protect the freedoms enshrined in the First Amendment by enforcing restraints on extreme partisan gerrymanders.

II. Maryland's 2011 Redistricting Violates The First Amendment Under The *Gill v. Whitford* Test.

The *Whitford* plaintiffs' test provides a judicially manageable standard that appropriately captures the structural and statewide dimension of the harms that extreme partisan gerrymanders impose on the political process and voters' constitutional rights. The *Whitford* test ensures that judicial intervention will redress deeply anti-democratic extreme gerrymanders, while leaving room for the ordinary "pull, haul, and trade" of the democratic process. *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994). Under the *Whitford* test, Maryland's map is clearly unconstitutional.

A. The Three-Factor Test Proposed In *Whitford* Captures Extreme Gerrymanders.

The plaintiffs in *Whitford* set out a three-factor test that is carefully crafted to identify unconstitutional extreme partisan gerrymanders. *See Whitford* Appellees' Br. 2–3; *Whitford* Brennan Br. 8–11. That test focuses on objective evidence of entrenchment and singles out those maps that compromise legislative representativeness and accountability—and, in the process, erode voters' rights under the First and Fourteenth Amendments.

Under the *Whitford* plaintiffs' test, challengers must show that (1) the party in power intended a districting plan "to place a severe impediment on the effectiveness of the voters of individual citizens on the basis of their political affiliation"; (2) the plan has discriminatory effect—that is, it exhibits a partisan imbalance that is both "sizable" and "likely to persist throughout the decennial period"; and (3) there is no valid justification for the discriminatory effect, such as "legitimate state prerogatives and neutral factors

that are implicated in the districting process." *Whitford* Appellees Br. 2–3 (internal quotation marks omitted).

Recent decisions confirm that this is a judicially manageable test. The district courts in *Whitford* and *Rucho* both applied the test in an objective, even-handed way without facing the manageability problems that had plagued earlier cases. *Whitford* v. *Nichol*, 151 F. Supp. 3d 918, 927–31 (W.D. Wis. 2015); *Rucho*, 2018 WL 341658, at *16–32. Similarly, the plaintiffs in *League of Women Voters of Pennsylvania* based their state-law claims on an analogous test, and the state court had no difficulty applying it. Petitioner's Opening Brief at 65–74, *League of Women Voters of Pa.*, 2018 WL 496907 (No. 159 MM 2017); *League of Women Voters of Pa.*, 2018 WL 496907, at *1.

Unlike earlier tests for partisan gerrymandering that this Court has disapproved, the three-factor *Whitford* test permits courts reliably to identify those situations where credible evidence shows that a state intentionally, effectively, and without legitimate justification has targeted one political party for sustained electoral disadvantage. The *Whitford* plaintiffs' test avoids penalizing the "ordinary" political considerations this Court has suggested are constitutionally tolerable. *Gaffney* v. *Cummings*, 412 U.S. 735 (1973); *Bush* v. *Vera*, 517 U.S. 952 (1996). The test leaves in the Court's sights only the most extreme, anti-democratic—and unconstitutional—gerrymanders.

B. The Additional Factors Identified By The Brennan Center In *Whitford* Help Detect Extreme Gerrymanders.

As the Brennan Center explained in *Whitford*, several additional objective criteria can further guide

courts' application of the *Whitford* plaintiffs' test and ensure that it identifies constitutional violations. Those factors include single-party control of redistricting, a recent history of close elections, and other indicia of departures from "normal politics" in the redistricting process. *Whitford* Brennan Br. 11–19. These intuitive criteria are relevant to and help determine whether, under the proposed *Whitford* test, the political party in power intended to and did entrench itself and its supporters at the expense of the other party's supporters.

The first criterion—single-party control—is a prerequisite for an extreme partisan gerrymander. Before a party can implement an excessive gerrymander, it must have the means to do so. *See* Anthony J. McGann *et al.*, Gerrymandering in America 147 (2016). When a single party is in control, a minority party is much less able to influence the redistricting process, and normal political checks and balances are much less likely to safeguard against unconstitutional overreach. *Whitford* Brennan Br. 12.

The second criterion—a recent history of close statewide elections—is not a prerequisite for extreme partisan gerrymanders, but it can be highly probative because it helps identify states where map-drawers have the opportunity and incentive to engage in extreme gerrymandering. In highly competitive states with closely fought elections, the geographic distribution of each party's supporters tends to be more or less even, and therefore—absent deliberate intervention—power is likely to shift back and forth over the course of a decade. If, after redistricting, one party suddenly gains an advantage and, more importantly, that advantage appears immune to normal political swings, it is highly suggestive of untoward conduct. Moreover, map-makers in states with a history of close elections

will have a powerful incentive to undertake a severe, enduring gerrymander—and can easily do so by strategically joining precincts together to engineer a durable entrenchment. In a state without close elections, by contrast, the dominant party can often maintain its majority whether or not it gerrymanders district lines. *Whitford* Brennan Br. 12–14.

Other facts about a state's political geography might, in certain instances, also create both the opportunity and incentive for extreme gerrymandering even in the absence of a history of close statewide elections. For example, regions of a state that contain large and cohesive pockets of a political minority group can assist—or threaten—the majority party's attempts to maximize its seats. In these sub-regions of a state, map-makers can still eke out an improper partisan advantage by carefully packing and cracking voters for the minority party. Likewise, map-makers must pay particularly careful attention to the ways in which they draw lines in these sub-regions, lest they gift the minority party with unintended additional seats. These incentives to squeeze out an incremental advantage can be especially compelling when, for example, a political party has sole control of the line-drawing process in a state and it is at a nationwide disadvantage in the number of congressional seats for which it can draw the lines.

In addition to single-party control and favorable geography, the manner in which the redistricting process is conducted can also be quite instructive in applying the *Whitford* test. Further indicia of improper partisan gerrymanders can include defects in the process itself: situations where the majority party conducted the redistricting in secret; where map-drawers and legislators drew and approved maps with unusual haste (and without providing voters or the other party

with sufficient time to evaluate the maps); where the dominant party altered redistricting rules (including oversight mechanisms) in a way likely to favor that party; and where outsized amounts of outside spending affected the process. These factors all reflect departures from "normal politics" in the redistricting process and can indicate that the redistricting party sought and achieved unconstitutional, partisan goals. *Whitford* Brennan Br. 18–19.

C. The *Whitford* Test And Other Relevant Indicia Show That Maryland's 2011 Redistricting Is An Extreme Partisan Gerrymander.

1. Maryland's 2011 congressional redistricting is an extreme, statewide partisan gerrymander under the *Whitford* plaintiffs' three-part test.

a. To begin, there can be no serious dispute that Appellants have identified the requisite intent. The admitted purpose of the redistricting plan in Maryland was to maximize the number of congressional seats held by Democrats and to entrench the party's control over those seats at the expense of Republican voters.

Although the map-drawers sought to achieve their objective by redrawing the Sixth District, the record could not be clearer that Maryland Democrats wanted to maximize their power across the entire state. Governor O'Malley frankly testified that his goal was to "create a map that was more favorable for Democrats" by increasing their congressional seats from six to seven. JA79–80; *accord* JA57, 67, 392–95. O'Malley and other Maryland Democrats were agnostic about how to accomplish that goal: They did not initially instruct map-drawers to gerrymander the Sixth District; they asked, instead, for a map that would

contain seven safe Democratic districts. JA104–08, 121; *see* JA156 ("The intent was to see if there was a way to get another Democratic district in the state . . . ."). The First District, the other Republican district in Maryland, was rejected as a target because gerrymandering it would require too awkward a maneuver. JA42. So, as Governor O'Malley explained under oath, "a decision was made to go for the Sixth." JA44.

b. Next, the redistricting was plainly successful at maximizing Maryland Democrats' statewide power, as Democratic state lawmakers recognized when they saw the final product. JA232, 664. In fact, election results since 2011 confirm what was readily apparent to Democratic lawmakers: Maryland Democrats now enjoy seven reliable House seats, where before they had six. JA666, 891; J.S. App. 52a–53a.

The map-drawers' success is also clear under two widely used tests for partisan bias, the efficiency gap and the seats-to-votes curve.[2] Under both tests, Maryland had "notably high Democratic skews" in congressional elections after 2011, with average biases of 12 to 14 percent. Laura Royden & Michael Li, Brennan Ctr. for Justice, Extreme Maps 6, 9 (2017), https://perma.cc/6V52-RPHZ. Another empirical analysis found a statistically significant pro-Democratic bias across the state in 2014, which was otherwise a banner year for Republicans. Samuel S.-H. Wang,

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[2] As the court in *Rucho* recognized, reference to empirical tests does not require courts to "constitutionalize" social science. 2018 WL 341658, at *26. Empirical analyses are simply one form of *evidence*—no different than testimony from government officials or election results—that can help a court determine whether the *legal standards* for extreme partisan gerrymandering have been satisfied. *Id.* This court has made similar uses of social-science evidence and statistical tests in numerous contexts. *See id.* at *27, 29 (citing cases).

Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin, 15 Election L.J. 367, 378–79 (2016); *see also* McGann et al., *supra*, at 88–89 (finding statistically significant bias toward Democrats in Maryland's 2012 elections). By any measure, then, Maryland's 2011 congressional redistricting was a highly effective pro-Democratic gerrymander with substantial statewide consequences.

c. Finally, no legitimate or neutral redistricting criterion could justify the drastic changes to Maryland's congressional districts. JA774–75. The State's alternative explanation is that the changes preserved a purported community of interest near the "I-270 corridor," JA707–08, but map-drawers did not consider the I-270 corridor at all, JA136–37. Meanwhile, the Democrats who voted for the map did not believe the I-270 corridor had anything to do with it. J.S. App. 50a–51a; JA908. They correctly understood that the map had been redrawn to entrench Democrats' power at Republicans' expense, just as Governor O'Malley candidly testified. JA232, 661–65. Finally, Appellants' experts concluded that the 2011 redistricting, rather than preserve communities of interest, actually split a large number of communities within the Sixth District. *See* JA380 (2011 plan split 59% of communities of interest), 778 ("The Republican rural communities along the Pennsylvania border were fragmented"), 805–09 (2011 plan split incorporated cities and towns, whereas previous plan did not do so), 820 (same). So, there is no partisan-neutral way to explain the gerrymander.

2. The objective indicia identified by the Brennan Center to guide application of the three-factor *Whitford* test bolster the conclusion that Maryland's 2011 congressional redistricting is an extreme and constitutionally improper partisan gerrymander.

a. The 2011 redistricting satisfied the main prerequisite for a partisan gerrymander—single-party control of the redistricting process. Democrats controlled all three branches of Maryland's government at the time of the gerrymander. Royden & Li, *supra*, at 7, 10. The redistricting process involved two parallel procedures, J.S. App. 18a, both dominated by Democrats. The first procedure was led by the Governor's Redistricting Advisory Committee, which had four Democratic members and just one Republican member (who voted against the redistricting plan). JA660. The second procedure was led by the Democratic members of Maryland's congressional delegation. JA100–03, 108–11; J.S. App. 45a–46a. The final map was approved along party lines by the Advisory Committee and the legislature, with all Republicans voting no and all but six Democrats voting yes. JA660–61.

It is little surprise, then, that Maryland is one of the most heavily gerrymandered Democratic states in the country. Royden & Li, *supra*, at 2, 6, 9. Without any influence over the redistricting process, Maryland Republicans were unable to protect their supporters' interests, allowing the Democratic majority to single out Republican voters for severe burdens on the basis of their political beliefs and affiliations.

b. In addition to single-party control, other characteristics of Maryland's political geography show that Democrats had a strong incentive to enact an extreme partisan gerrymander. Certain regions in Maryland have cohesive Republican populations that provided Democrats with both the opportunity and incentive to crack and pack in order to maximize the Democratic share of the state's congressional delegation. *See How Did Maryland Counties Vote in the 2016 Presidential Election?*, Balt. Sun, https://goo.gl/EHgzPC. Currently, Republicans in the state "are preparing to

mount an all-out assault on the Democratic super-majorities in the General Assembly." Michael Dresser, *Hogan, GOP Take Aim at Democratic Dominance of Maryland Legislature*, Balt. Sun, June 10, 2017, https://perma.cc/DK24-Y3ZQ. By rejiggering district lines to dilute Republicans' voting strength in congressional elections, Democratic map-drawers guaranteed that they will have a secure grip on a 7-1 majority in Maryland's congressional delegation for the course of a decade.

c. Finally, the record plainly shows that Maryland Democrats departed from normal politics in the redistricting process, much like Wisconsin Republicans did in *Whitford*, and this departure strongly suggests an untoward objective. *Whitford* Appellees' Br. 5–10.

Like Wisconsin Republicans in *Whitford*, Maryland Democrats in this case exploited their majority position by instituting a secretive, rushed redistricting process that almost entirely excluded the other party from the map-drawing exercise. The map that Maryland Democrats eventually approved was designed behind closed doors by a Democratic consulting firm acting under instructions from Maryland congressional Democrats (and Democrats alone). JA97, 100–03, 108–11; J.S. App. 46a. The consulting firm understood that its mandate was to protect Democratic incumbents' seats and add another Democratic seat. JA121, 123. It did not consider compactness, communities of interest, or other nonpartisan factors. JA135–37.

What is more, the redistricting plan was signed into law just three days after it was introduced, as part of what Governor O'Malley called "a hurry-up offense." JA58, 660. This gave essentially no time for ordinary political forces to act as a check on Maryland

Democrats' power grab. In a testament to the degree of Democratic dominance over the process, Democratic state lawmakers were remarkably blunt about the plan's intent, candidly explaining that they supported it because it meant "more Democrats in the House of Representatives." JA664.

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In short, the *Whitford* plaintiffs' three-factor test and the additional indicia of extreme gerrymandering identified by the Brennan Center confirm that Maryland's map-drawers engaged in unconstitutional partisan discrimination.

D. Maryland's Extreme Partisan Gerrymander Burdened Republicans' First Amendment Rights On A Statewide Basis.

As the Brennan Center explained in *Whitford*, extreme partisan gerrymandering violates a host of constitutional principles, including representative and responsive government, the right to vote, and equal protection. *Whitford* Brennan Br. 21–36. Perhaps chief among these foundational values is the First Amendment's right of association. *See id.* at 33–36.

The First Amendment protects an individual's right to associate "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 622 (1984). When individuals who associate for "the advancement of political goals and ideas," *Timmons* v. *Twin Cities Areas New Party*, 520 U.S. 351, 357 (1997), are in a minority political group, however, they are vulnerable to attempts by the dominant group to stifle their political expression and participation, *see* Lori A. Ringhand, *Voter Viewpoint Discrimination: A First Amendment Challenge to Voter Participation Restrictions*, 13 Election L.J. 288, 291–93 (2014).

The First Amendment thus "prohibits state regulations that discriminatorily burden a political group's ability to influence the electoral process." Election Law and Constitutional Law Scholars Br. 2, *Gill* v. *Whitford* (No. 16-1161) ("*Whitford* Election Law Scholars Br."). Indeed, this Court has long protected minority groups from discriminatory burdens on their right to participate in elections. *E.g.*, *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968) (striking down law that gave "a decided advantage" to "the two old established parties"). And it has disapproved of laws that "tip[] the electoral process in favor of the incumbent party," *Elrod* v. *Burns*, 427 U.S. 347, 355–56 (1976) (plurality op.), or otherwise impose unequal burdens on political participation, *see Anderson* v. *Celebrezze*, 460 U.S. 780, 793–94 (1983) ("A burden that falls unequally on new or small political parties . . . impinges, by its very nature, on associational choices protected by the First Amendment"); *Kusper* v. *Pontikes*, 414 U.S. 51, 58 (1973) (shielding right to "associate effectively with the party of [one's] choice").

These principles apply with full force in the partisan gerrymandering context, as a group of election law scholars persuasively explained in *Whitford*. *Whitford* Election Law Scholars Br. 11–12; *see* Daniel P. Tokaji, *Voting Is Association*, 43 Fla. St. L. Rev. 763, 777, 785 (2016); Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 Calif. L. Rev. 1209, 1249 (2003). Moreover, this is not just a matter of associating with like-minded voters within a district; a voter's right to associate to promote her political beliefs at the state's polls does not end at her district's borders. Rather, effective political participation requires that voters be able "to exercise that right of association with other people elsewhere in the state." Tr. of Oral Arg. at 5,

Gill v. *Whitford* (2017) (No. 16-1161) (Roberts, C.J.); *see Whitford* Appellees' Br. 31.

In this case, the case law and the facts show that Maryland's 2011 redistricting plan violated Maryland Republicans' First Amendment right of association. *Supra*, at 8–9. Republican voters have suffered—and, absent this Court's intervention, will continue to suffer—severe and discriminatory burdens on their ability to band together to influence congressional elections in Maryland. As in *Whitford*, this Court should seize the opportunity to eliminate this "enduring subversion of the political process." *Whitford* Brennan Br. 6.

CONCLUSION

The Court should reverse the decision of the district court.

Respectfully submitted,

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